

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WUA XIONG,

Petitioner,

v.

WARDEN DITTMAN,

Respondent.

ORDER

12-cv-901-bbc

In an order entered on August 23, 2013, I denied petitioner Wua Xiong's petition for writ of habeas corpus as untimely pursuant to 28 U.S.C. § 2244(d). In doing so, I did not address the issuance of a certificate of appealability under Rule 11 of the Rules Governing Section 2254 Cases. Now, petitioner has filed a motion for issuance of a certificate of appealability. Dkt. #15. Petitioner's request will be denied.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v.

Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated in the August 23 order, reasonable jurists would not debate whether petitioner is entitled to relief under 28 U.S.C. § 2254. Therefore, no certificate of appealability will issue. Petitioner is free to seek a certificate of appealability from the court of appeals under Fed. R. App. P. 22, but that court will not consider his request unless he first files a notice of appeal in this court and pays the filing fee for the appeal or obtains leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that petitioner Wua Xiong's motion for issuance of a certificate of appealability, dkt. #15, is DENIED.

Entered this 18th day of September, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge